IN THE COURT OF PPEAL OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

C.A.No. 1234/96(F)

Prema Wahalatantri,

Aramanagolla, Horana

Plaintiff

Vs

K. David

Aramanagolla, Horana and others

Defendants

AND

D.C.Horana No. 3941/P

K. Karunasena

Aramanagolla, Horana

4th Defendant Appellant

vs

Y.A. Kusumawathie

Aramangolla, Horana

Subtd.9A Defendant Respondent

and others

K. Jayaratne

Aramanagolla, Horana

10th Defendant Respondent

K.D. Rosalin Nona

Aramanagolla, Horana

22nd Defendant Respondent

BEFORE Deepali Wijesundera J.,

M. M. A. Gaffoor J

COUNSEL : Senany Dayaratne with Ms. Eshanthi Mendis for the 4th Defendant- Appellant

Kapila Liyanagamage for the 9A Defendant Respondent

K. Senadheera for the Plaintiff Respondent

Sandamal Rajapaksa for the 22nd Defendant Respondent

Asthika Devendra for the 10th Defendant Respondent

ARGUED ON: 02.12.2015

DECIDED ON: 14.01.2016

Gaffoor J.,

The Plaintiff instituted this action in the District Court of Horana on 12.06.1989 to partition the land called "Indigahadeniya Kumbura which is morefully described in the schedule to the Plaint. The said land is depicted as the corpus in Plan No. 468 dated 31st March, 1st April 1990 made by N.R.E.J Silva, Licensed Surveyor, marked as "X".

Originally the Plaintiff has allotted the land among herself and 1-10th Defendants and the other Defendants have intervened in the case subsequently. It appears that on 27.07.1998 when the trial commenced it is recorded that there is no contest amongst the parties as to the identity of the corpus. Parties have raised points of contest and thereafter the Plaintiff has given evidence.

Plaintiff has closed her case by producing Deeds P1 to P17 and the Plan "X" and its Report "X1" . Thereafter the 4th Defendant has given evidence. The Judgment has been entered on 24.09.1996 according to which, the 4th Defendant has been allotted 63/7560 shares of the corpus. Being aggrieved by this Judgment the 4th Defendant has preferred this appeal to this Court. The only question that is raised in the appeal by the 4th Defendant is that an extent of 10 perches which he got by Deed of Transfer No. 6182 dated 16.12.1988 and marked as 4D2 in his evidence, has not been allotted to him in the Judgment. The reason given by the learned District Judge for not allotting this 10 perches to the 4th Defendant was that the said Deed No. 6182 dated 16.12.1988(4D2) had been executed subsequent to the institution of this case and the said deed No. 6182 had not been tendered to court and therefore cannot be allotted. This finding of the learned District Judge is wrong. It is manifestly clear that the Deed

No.6182 which has been executed on 16.12.1988 and this action was instituted on 12.06.1989. Thus the Deed is not executed subsequent to the institution of the action but long before. Furthermore, when the 4th Defendant had given evidence this Deed (4D2) had been spoken about (see overleaf of page 121 of the appeal brief) and subsequently by a motion, this deed and three other deeds had been tendered to court on 16.07. 1996. The motion id date stamped on 17.07.1996. The learned District Judge has also referred to this deed in his judgment (see page 12 of the judgment)

It is surprising that how a document is given a marking as 4D2 without it being tendered to court and without receiving the attention of the Judge. This deed 4D2 which gives rights to 10 perches of the corpus to the 4th Defendant has been tendered to court and I therefore hold that the Deed No.6182 marked as 4D2 must be accepted as a document by which the 4th Defendant became entitled to 10 perches and this 10 perches should be added to the 63/7560 shares already allotted to the 4th Defendant by the judgment entered in this case. The notable point in this regard is that the parties to this case has also admitted that an extent of 10 perches was transferred to the 4th Defendant by the 20th and 22nd Defendants by the said Deed No. 6182 (see page 109 of the appeal brief). The learned District Judge is hereby directed to amend the

judgment to include 10 perches of the corpus to the shares already allotted to the 4th Defendant. The 10 perches need not be reverted back to the 20th and 22nd Defendants who are the transferees in Deed No. 6182(4D2).

Similarly the 9A Defendant has also submitted to this court that certain shares to which he is entitled have not been allotted to him. In the written submissions filed by the Counsel it is stated that –

i) Disohamy's right to 1/36 shares had been transferred to him by Deed marked 9V5 but the learned District Judge has left this share unallotted on the ground that that the Deed 9V5 was not tendered to court;

ii) Rights of Misilawathie to an undivided 67/2520 shares are unallotted to anyone as no evidence was led in respect of those rights;

iii) Since the 20th Defendant had transferred 40 perches to the Plaintiff, this 40 perches should be reduced from the shares of the 20th Defendant, but the learned District Judge has failed to do so in his judgment;

The 9A Defendant submits that the unallotted shares (1/36 share) of Disohamy and the 67/2520 shares of Misilawathie must be allotted to him.

It is submitted in the written submission filed on behalf of the 9A Defendant that the 1/36 share of Disohamy was not allotted to him because the learned District Judge has stated in his judgment that the Deed 9V5 relating to that share was not tendered to court. But the said deed had been on 29.03.1996, tendered as per Journal entry No. 43. As the Deed 9V5 has been now available, the share 1/36 of Disohamy, which she transferred by 9V5 can be allotted to 9A Defendant.

Regarding the undivided 67/2520 shares of Misilinona, the counsel for the 9A Defendant says, in his written submissions that this shares was not allotted to 9A Defendant because the learned District Judge was of the view that no evidence was led in this regard. But on 27.07.1995 the Plaintiff in her evidence has stated that Misilawathie by Deed P10 had transferred her share to the 9th Defendant (see pages 115 and 116 of the appeal brief), and therefore he submits that this 67/2520 share can be allotted to 9A Defendant.

I find that the reasons given by the counsel for 9A Defendant for the allotment of the shares of Disohamy and Misilawathie to 9A Defendant are sound and can be accepted, and I hold that these two shares may be allotted to 9A Defendant, as per evidence led in the case.

The counsel for the 9A Defendant has also submitted in his written submissions that he Plaintiff and the 20th defendant admitted in their evidence that the 20th Defendant by Deed marked P17 had transferred 40 perches out of his entitlement to the Plaintiff, but this 40 perches has not been reduced from 20th Defendant's as allotted in the judgment. He draws the attention of this court to proceedings of 27.07.1995 appears in page 119 and page 125 of the appeal brief. As the evidence of the plaintiff and the 20th Defendant clearly support the position stated by the 9A Defendant's counsel, the said 40 perches may be reduced from the shares allotted to the 20th Defendant.

Accordingly I hold that the judgment entered in this case may be amended and the parties may be allotted their respective shares in terms of the amended judgment. Since the other parties have made no

objection to the said amendments, I am of the view that the said amendments will not cause any prejudice to the rights of other parties.

I allow the appeal and send the record back to the District Court to enable the learned Judge to make the amendments suggested above, and after the amendments commission may be issued to effect the final Partition.

JUDGE OF THE COURT OF APPEAL

Wijesundera J.,

I agree.

JUDGE OF THE COURT OF APPEAL